

EMPLOYMENT APPEALS BOARD DECISION
2018-EAB-0725

Affirmed
Disqualification

PROCEDURAL HISTORY: On June 4, 2018, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant but not for misconduct (decision # 151801). The employer filed a timely request for hearing. On July 11, 2018, ALJ Amesbury conducted a hearing, and on July 13, 2018 issued Order No. 18-UI-113052, concluding that claimant's discharge was for misconduct. On July 18, 2018, claimant filed an application for review with the Employment Appeals Board (EAB).

Claimant submitted two written arguments to EAB, the first on July 18, 2018 and the second on August 13, 2018. Claimant did not certify that the first argument was provided to the other parties as required by OAR 471-041-0088 (October 29, 2006). In addition, both arguments offered new information that was not contained in the hearing record, but claimant did not explain why he did not present the information during the hearing or otherwise show as required by OAR 471-041-0090(2) (October 29, 2006) that factors or circumstances beyond his reasonable control prevented him from doing so. For these reasons, EAB did not consider the new information that claimant sought to present by way of his written arguments, and considered only information in the record when reaching this decision.

FINDINGS OF FACT: (1) Tri County Metropolitan employed claimant as a bus operator from April 25, 2016 until May 7, 2018.

(2) As condition of employment as a bus operator, the employer required claimant to hold and maintain a valid commercial driver's license (CDL). Claimant also was required under federal law to have a CDL. *See* 49 CFR §§383.1, 383.3, 383.5. Claimant understood that he was required to maintain a valid CDL as a condition of employment and a legal requirement.

(3) On February 20, 2018, while on duty and driving one of the employer's buses, claimant was stopped by a police officer for driving at an excessive speed. During the stop, the officer administered a breathalyzer test to claimant and it showed that claimant had a blood alcohol content (BAC) of 0.16 percent. The officer also arranged to have claimant's blood sugar level measured and it was recorded at

52. A blood glucose measure of 52 is lower than the normal range. As a result of the traffic stop, claimant was charged with the crime of driving under the influence of intoxicants (DUI).

(4) On February 20, 2018, the employer learned that police had stopped claimant earlier that day and they suspected claimant of having committed the crime DUI while operating a bus. As of that day, the employer placed claimant on administrative leave pending determining the outcome of the stop and the recorded BAC on claimant's CDL. Claimant did not work thereafter.

(5) On approximately April 16, 2018, claimant participated in an Oregon Department of Motor Vehicles (DMV) hearing to consider whether his CDL would be suspended due to his BAC at the time he was stopped. After the hearing, DMV suspended claimant's CDL beginning on April 25, 2018. On April 20, 2018, DMV notified the employer claimant's CDL was suspended for one year and, on that day, the employer sent a letter to claimant informing him that he had until May 6, 2018 to submit information showing that his CDL remained valid or he would be discharged. Claimant did not make a submission to the employer.

(6) On May 7, 2018, the employer discharged claimant because he did not have a valid CDL as of April 25, 2018.

(7) Sometime after claimant was discharged, a physician told claimant that he had gut fermentation syndrome, which can result in the spontaneous production of ethanol in an individual's digestive system, and can lead to false positive results in alcohol testing. Claimant also was told that low blood sugar could produce acetone, which could be falsely identified as alcohol on a breathalyzer test. Gut fermentation syndrome is an extremely rare condition.¹

CONCLUSIONS AND REASONS: The employer discharged claimant for misconduct.

ORS 657.176(2)(a) requires a disqualification from unemployment insurance benefits if the employer discharged claimant for misconduct connected with work. OAR 471-030-0038(2)(c) (January 11, 2018) provides that the willful or wantonly negligent failure to maintain a license, certification or other similar authority necessary to the performance of an occupation is misconduct so long as such failure is reasonably attributable to the individual. OAR 471-030-0038(1)(c) defines wanton negligence, in relevant part, as indifference to the consequences of an act or series of actions, or a failure to act or a series of failures to act, where the individual acting or failing to act is conscious of his or her conduct and knew or should have known that his or her conduct would probably result in the loss of the license, certification or similar authority.

¹ EAB takes notice of this fact which was found in generally reliable sources. See e.g., S. Fayemiwo *et al.*, *Gut Fermentation Syndrome*, African Journal of Clinical and Experimental Microbiology, 2014, 15(1): 48-50, found at https://scholar.google.com/scholar?as_sdt=1,38&q=gut+fermentation+syndrome&hl=en; B. Cordell *et al.*, *A Case Study of Gut Fermentation Syndrome*, International Journal of Clinical Medicine, 2013, Vol. 4, 309-312, found at https://scholar.google.com/scholar?as_sdt=1,38&q=gut+fermentation+syndrome&hl=en; K. Eaton, *Gut fermentation: a reappraisal of an old clinical condition with diagnostic tests and management: a discussion paper*, Journal of Royal Society of Medicine, 1991, Vol. 84, found at https://scholar.google.com/scholar?as_sdt=1,38&q=gut+fermentation+syndrome&hl=en; <https://www.cnn.com/2015/12/31/health/auto-brewery-syndrome-dui.../index.html>.

To be a bus operator for the employer, federal law and the employer's policies required claimant to hold and maintain a valid CDL. Claimant agreed that he was aware that he needed a CDL to remain employed. Transcript at 23. The issue in considering whether claimant should be disqualified from benefits is whether he lost his CDL due to willful or wantonly negligent behavior on his part. Claimant contended that the 0.16 percent BAC he registered on February 20, 2018 was not the result of him consuming any alcohol that day, but due to ethanol or acetone involuntarily and spontaneously generated in his digestive system by gut fermentation syndrome or hypoglycemia, which would not be attributable to willful or wantonly negligent behavior. Transcript at 24, 27, 29, 30.

Generally, a positive result for alcohol on a breathalyzer test is considered a reliable indication of the alcohol present in an individual's system. Without more, the presence of that alcohol is usually considered to be the result of the individual having consumed alcohol. If an individual consumes an excessive amount of alcohol and chooses to drive, the individual normally is imputed to have been aware that he or she might lose his or her driver's license for some period time if his or her BAC exceeds the statutory limit. As such, if an individual loses the individual's driver's license due to an excessive BAC resulting from voluntarily consumed alcohol, the behavior that caused the individual to lose the individual's driver's license is usually considered, without more, reasonably attributable to the individual's wantonly negligent behavior.

The involuntary condition(s) that claimant contended caused his BAC to register 0.16 percent and exceed the legal limit without him having had any alcohol are extremely rare, as indicated above. While claimant generally asserted at hearing that his BAC as recorded on February 20, 2018 was due to the actions of those involuntary conditions, he did not present sufficient evidence to the presumption that his BAC as recorded on February 20, 2018 breathalyzer test was due to having voluntarily consumed alcohol. Claimant's evidence shows only that his contention is not theoretically impossible, but not that it may be plausible or likely in this particular case, and that, in this particular case, the breathalyzer results should not be considered an accurate measure of alcohol that claimant voluntarily consumed. The preponderance of the evidence in the record establishes that the BAC claimant recorded on February 20, 2018 and his subsequent loss of his CDL was reasonably attributable to claimant's wantonly negligent behavior.

Since 2004, the Department has consistently interpreted OAR 471-030-0038(3)(c) to define the loss of the legal authority to perform an occupation as a type of misconduct per se that is not subject to the general exculpatory provisions of OAR 471-030-0038(3)(b). *See* December 27, 2004 letter to the Employment Appeals Board from Tom Byerley, Assistant Director, Unemployment Insurance Division (exceptions to misconduct under OAR 471-030-0038(3)(b) do not apply to behavior falling under OAR 471-030-0038(3)(c). Since the exculpatory provisions cannot be applied in this case, claimant's behavior may not be excused from constituting misconduct as an isolated instance of poor judgment or a good faith error, and it therefore was misconduct.²

The employer discharged claimant for unexcused misconduct. Claimant is disqualified from receiving unemployment insurance benefits.

² Employment Appeals Board, 05-AB-0049, January 4, 2005 (so stating and referring to Byerley letter); Employment Appeals Board, 05-AB-0050, February 7, 2005 (same); Employment Appeals Board, 05-AB-0500, April 11, 2005; Employment Appeals Board, 07-AB-0405, March 8, 2007; Employment Appeals Board, 08-AB-0580, April 10, 2008; Employment Appeals Board, 09-AB-2437, August 11, 2009; Employment Appeals Board, 11-AB-0602, March 10, 2011.

DECISION: Order No. 18-UI-113052 is affirmed.

J. S. Cromwell and D. P. Hettle;
S. Alba, not participating.

DATE of Service: August 17, 2018

NOTE: You may appeal this decision by filing a Petition for Judicial Review with the Oregon Court of Appeals within 30 days of the date of service listed above. *See* ORS 657.282. For forms and information, you may write to the Oregon Court of Appeals, Records Section, 1163 State Street, Salem, Oregon 97310 or visit the Court of Appeals website at courts.oregon.gov. Once on the website, use the ‘search’ function to search for ‘petition for judicial review employment appeals board’. A link to the forms and information will be among the search results.

Please help us improve our service by completing an online customer service survey. To complete the survey, please go to <https://www.surveymonkey.com/s/5WQXNJH>. If you are unable to complete the survey online and wish to have a paper copy of the survey, please contact our office.